No. 15,619

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

MARY TROUTFELT COHEN,
Appellee,

and

MARY TROUTFELT COHEN,
Appellant,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellee.

BRIEF OF CROSS-APPELLEE IN ANSWER TO CROSS-APPEAL.

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JURISDICTIONAL STATEMENT.

The action was begun in the Superior Court of the State of California in and for the City and County of San Francisco (R. 8) and was removed by the defendant to the Court below (R. 6) pursuant to 28

U.S.C. § 1441. The District Court had jurisdiction under 28 U.S.C. § 1332(a) (1) (F. 1, 2; R. 100, 101), and this Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

QUESTIONS PRESENTED.

Is the provision in this life insurance policy that:

> "It is not necessary to employ any firm or person to collect the proceeds of this policy"

to be tortured into a warranty by the insurance company of such a character as will obligate the insurer to pay attorney's fees of one who engages in litigation with the company.

ARGUMENT.

I. TO SUCCEED IN HER CROSS-APPEAL, PLAINTIFF MUST DEMONSTRATE THAT THE PHRASE IN QUESTION SHOULD BE CONSTRUED AS A WARRANTY, AND FURTHERMORE THAT IT IS A WARRANTY OF SUCH SCOPE AS TO INCLUDE ATTORNEY'S FEES OF ONE WHO ENGAGES IN LITIGATION WITH THE INSURER. PLAINTIFF'S EFFORTS IN THIS REGARD ARE TOTALLY UNCONVINCING. NEITHER THE CASE AUTHORITY NOR THE POLICY REASONS ADVANCED BY PLAINTIFF IN HER BRIEF WILL BEAR UP UNDER CLOSE SCRUTINY.

In support of her novel contention, plaintiff has unearthed one case, and one case only. But instead of supporting plaintiff's position, that case effectively destroys it. The case in question is *Guardian Life Insurance Co. of America v. Brackett,* 108 Ind. App. 422, 27 N.E. 2d 103. The insurance policy in that

case had a clause similar to the one in dispute here, reading as follows:

> To collect the amount payable under this policy it is not necessary to employ any person, firm or corporation.

By skillful editing, plaintiff has presented the Court with language from that case allegedly supporting her theories of warranty and reliance. The fact remains, however, that the Court in that case although it found for plaintiff, *did not award plaintiff attorney's fees or any amount measured by attorney's fees.*

A complete reading of this case demonstrates the correct interpretation of the insurance provision in that case and in the present one. The issue in the *Brackett* case, *supra,* was whether or not the insured had made "due proof" of disability within the proper time period. The facts showed that the insured had been rendered mentally unfit by his injury and that he had called on an agent of the insurer subsequent to that injury and apprised the agent of the fact of the injury. He did not, however, make formal application for the benefits due him under the contract. The insurer contended that a formal application was required by the policy, and that for lack of a timely formal application, it was not liable. The Court held for plaintiff, reasoning that the informal notification of disability coupled with the quoted provision in the insurance contract was sufficient to constitute "due proof." The Court relied strongly on the quoted contract provision, interpreting it to mean that the insurance company promises to assist the insured

in filling out his applications and in perfecting his rights. The company takes upon itself the obligation to investigate the claim of the insured when it is given notice that such a claim exists. This is what it meant when the policy reads that "it is not necessary to employ any person, firm or corporation to collect the amount payable under this policy."

So in the present case, the provision of the insurance policy can not be given the strained and unreasonable construction urged by plaintiff. The provision means just what it says. It says in effect "come to us, when facts occur that relate to your policy; we will investigate and tell you if these facts entitle you to payments; we will aid you in filling out any applications and forms that are required; we will help you to perfect your claims and rights under the insurance contract. There is no need to secure aid from some other person in these matters, since as one of our services, we provide that aid ourselves."

A provision with such a meaning has a logical place in an insurance contract. In addition to paying out money, the modern insurance company engages in numerous other services to assist and benefit those to whom it must pay benefits. It is consistent with this picture that a policy with such a company might contain a provision that there is no need to secure aid from any other person, such as a broker or insurance agent, in collecting the proceeds of this policy, and that the processing and investigation work will be done by the company itself.

By contrast, plaintiff's contention appears incongruous and unrealistic. Plaintiff would torture this phrase to say "whenever you want to pick a fight with me, feel free to go right ahead, for I will pay your expenses and attorney's fees." This would be a startling position for any human agency to take. It is simply out of place in an insurance contract. One could not expect the trial Court to favor or adopt such an *unreasonable* construction, and the district judge in this case did not! As pointed out by the Court below (R. 81):

> It is very unusual for an insurer to promise to pay attorney's fees in the event that a dispute with an insured should lead to litigation; consequently the language creating such unusual liability ought to be clear and free from ambiguity. In the opinion of this Court the quoted language is not sufficiently definite.

That it would be unusual for an insurer to make such a promise is amply demonstrated by the fact that plaintiff could find no case involving such a promise in a setting like the present one. That plaintiff's construction is unreasonable can be seen by a contemplation of the nature of an insurance contract, and, in addition, is illustrated by contrasting plaintiff's attempted construction with the construction of a similar phrase by the Court in the *Brackett* case. Surely the lower Court did not err in rejecting a construction which was unreasonable and unrealistic when confronted with another interpretation that is both reasonable and obvious.

In any event, the patently reasonable construction by the lower Court should not be disturbed on appeal.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the District Court did not err with regard to its ruling on attorney's fees, and that, whether or not defendant should prevail on its appeal, plaintiff is not entitled to attorney's fees in this Court or in the Court below. The ruling of the District Court with regard to attorney's fees should be affirmed.

Dated, San Francisco, California,

Respectfully submitted,

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